Supreme Court of the United States

OCTOBER TERM, 1948.

Cary R. Alburn, Etc., Et Al.,
Petitioners,
vs.
The Union Trust Company, Et Al.,
Respondents.
No. 549.

Cary R. Alburn, Etc., Et Al.,
Petitioners,
vs.
The National City Bank of Cleveland, Et Al.,
Respondents.
No. 550.

On Writ of Certiorari to the Supreme Court of Ohio.

BRIEF OF RESPONDENT, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO.

HERBERT S. DUFFY,
Attorney General of Ohio,
W. H. ANNAT,
Assistant Attorney General of Ohio,
State House, Columbus 15, Ohio,
Attorneys for the Superintendent of Banks of the State of Ohio.

Of Counsel:
WILLIAM C. BRYANT,
DONALD B. LEACH.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

INDEX.

Table of Cases Cited.

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 549 and No. 550.

No. 549.

CARY R. ALBURN, TRUSTEE UNDER THE LAST WILL AND Testament of Charles H. Salmons, Deceased; John C. Lincoln; Helen E. Bing, Trustee of the Estate of Sol R. Bing, Deceased; and Henry George School of Social Science, a Corporation,

Petitioners,

vs.

THE UNION TRUST COMPANY, A CORPORATION, EAST 9TH Street and Euclid Avenue, Cleveland, Ohio; Paul A. Mitchell, Superintendent of Banks of the State of Ohio, in Charge of the Liquidation of The Union Trust Company; The National City Bank of Cleveland, Trustee Under Agreement and Declaration of Trust, Dated August 15, 1924; Union Properties, Inc., a Corporation; and Harold B. Burdick, The First Central Trust Company, Trustee Under the Deed of Trust of Frederick W. Work; Henry W. Mathews, Alice L. Scott, and Ralph Stickle, Successor Trustee Under the Will of Andrew J. Bause, Deceased,

Respondents.

No. 550.

CARY R. ALBURN, TRUSTEE UNDER THE LAST WILL AND Testament of Charles H. Salmons, Deceased; John C. Lincoln; Helen E. Bing, Trustee of the Estate of Sol R. Bing, Deceased; and Henry George School of Social Science, a Corporation,

Petitioners,

vs.

THE NATIONAL CITY BANK OF CLEVELAND, SUCCESSOR Trustee Under the Agreement and Declaration of Trust Dated August 15, 1924; H. Earl Cook, Superintendent of Banks of the State of Ohio, in Charge of the Liquidation of The Union Trust Company; The Union Trust Company, a Corporation; Union Properties, Inc., a Corporation; and Harold B. Burdick, The First Central Trust Company, Trustee Under the Deed of Trust of Frederick W. Work; Henry W. Mathews, Alice L. Scott, and Ralph Stickle, Successor Trustee Under the Will of Andrew J. Bause, Deceased,

Respondents.

BRIEF OF RESPONDENT, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO.

In the case of **Ulmer v. Fulton**, 129 O. S., 323, 195 N. E., 557 (1935), a bank and trust company, incorporated under the laws of Ohio, declared itself trustee of a portfolio of mortgages it then owned and sold participation certificates therein to the public. Subsequently, the bank was taken over for liquidation by the superintendent of banks and one of the holders of the mortgage participation certificates brought suit to enjoin the transfer of the trust to a successor trustee on the ground that it was invalid and that the assets of the trust belonged to the bank. The Supreme Court of Ohio held that the trust was void, that title to the mortgages allocated to the trust remained in the bank and trust company and that the participation certificate holders were creditors of the bank in the amount they paid for the mortgages.

In 1940 the Supreme Court of Ohio applied the same rule to a trust created by a bank and trust company out of land which it owned and in which it sold certificates of participation, commonly known as "land trust certificates," in Ohio. **Haggerty v. Squire**, 137 O. S., 207, 28 N. E. (2d), 554 (1940).

Various other trusts created in a similar manner out of mortgages or land owned by bank and trust companies of Ohio have been declared void and set aside by the Ohio courts. **Arend v. Fulton, Supt.**, 53 O. App., 503, 5 N. E. (2d), 792 (1936) (Mortgages); **Gallagher v. Squire, Supt.**, 57 O. App., 222, 13 N. E. (2d), 373 (1937) (Land); **Grant v. City Trust & Savings Bank**, 26 O. L. Abs., 227 (1937) (Mortgages).

The grounds upon which the Supreme Court of Ohio held such trusts void appear in the syllabus of the opinion in **Ulmer v. Fulton**, supra:

> "1. Banks and trust companies have only such powers as are expressly conferred on them by their charters and by statute, or such as may fairly be implied from those expressly given.
>
> "2. The statutes of Ohio do not authorize a bank and trust company to act in the dual capacity of settlor and trustee by creating trusts out of its own securities and selling participation certificates therein to the public.
>
> "3. Such undertakings are opposed to sound public policy and are invalid.
>
> "4. Upon the insolvency of a bank and trust company, which has attempted to create trusts out of its own securities and has sold participation certificates therein to the public, the holders of such participation certificates will be placed in the position of general creditors.
>
> "5. The legal title to all securities which may have been allocated to such ineffective trusts remains in the bank and trust company."

In its opinion in **Ulmer v. Fulton**, supra, the Supreme Court of Ohio stated:

> "Besides, such course of conduct is so antagonistic to the fundamental conceptions of the manner in which a bank and trust company should operate and offers so many openings for abusive practices as to be opposed to sound public policy. • • •"
>
> "In the next place the acts of the bank in setting up these various purported trusts, affecting the interests of different classes of its customers, being not only beyond its granted powers but against public policy 'cannot be made good by estoppel'. There is a distinction between acts of a corporation which are invalid for all purposes and in relation to all persons, and those within the range of its general powers which are accomplished in an unauthorized manner. • • •

"* * * Hence, even where such a bank fully performs a contract unauthorized by law, it is a nullity and estoppel cannot be interposed to circumvent its invalidity. * * *"

Pursuant to the counsel of the then attorney general of Ohio, shortly after the decision in the **Ulmer** case, the superintendent of banks ordered all open bank and trust companies in Ohio to terminate such trusts, retire the certificates of participation, enter the assets of the trusts upon the books of the bank as assets thereof and recognize the certificate holders as general creditors. The superintendent's letter to the banks, dated June 17, 1935, is as follows:

"State of Ohio
Division of Banks
Columbus

June 17, 1935

"Gentlemen:

"As you are probably aware, the Supreme Court of Ohio in a decision rendered recently in case styled 'Ulmer versus Fulton, Superintendent of Banks' has held that a bank and trust company has not the legal right to create a trust out of assets which it owns and sells participations therein.

"While the case referred to is one growing out of the liquidation of a closed bank and trust company, nevertheless I recognize that the opinion as announced therein will necessitate in open banks and trust companies the retirement of certificates of participation or like instruments issued in connection with alleged trusts created out of assets belonging to such banks and trust companies as have issued the same.

"In compliance with the rule of law laid down by the Supreme Court, it will be necessary for all so-called participation trusts, created out of assets belonging to such bank or trust company, to be promptly terminated. As I understand this case,

the holders of the participation certificates or other evidence of debt, are general creditors of the bank or trust company having issued the same and the assets against which the same have been so issued are assets of said bank or trust company and must appear as such on its books, records and reports.

"If the law as determined by the Supreme Court of Ohio in the case of Ulmer versus Fulton, Superintendent of Banks, is applicable to any so-called trust in your institution, kindly see that full compliance with the law is promptly had and I will appreciate immediate advice relative to the progress being made in accordance therewith.

Yours very truly,

S. H. Squire,
Superintendent of Banks."

(QTR 30, DJR 39-40)

In addition to counseling the superintendent to compel the open banks to terminate such trusts, the attorney general, through special counsel, instituted litigation to recover the assets of any such trusts which had been transferred to successor trustees from closed banks in liquidation. Some of these suits are reported in: **State, ex rel. Squire, v. Central United National Bank, Trustee**, 20 O. L. Abs., 238; **State, ex rel. Squire, v. National City Bank, Trustee**, 24 O. L. Abs., 160; **Arend v. Fulton**, 53 O. App., 503, 5 N. E. (2d), 792; **Gallagher v. Squire**, 57 O. App., 222, 13 N. E. (2d), 373; **Grant v. City Trust & Savings Bank**, 26 O. L. Abs., 227.

With reference to the trust in this case, the superintendent of banks wrote the following letter to the successor trustee, National City Bank of Cleveland, on August 3, 1936:

"Liquidation of
The Union Trust Co.
Cleveland, Ohio

August 3, 1936.

"The National City Bank of Cleveland
Cleveland, Ohio

"Gentlemen:

"Under date of October 16, 1933, you were appointed by the Common Pleas Court of Cuyahoga County as Successor Trustee under the Agreement and Declaration of Trust dated August 15, 1924, by and between The Union Trust Company and the holders of land trust certificates of equitable ownership in the premises described in a certain indenture of lease from The Union Trust Company to The Union Square Company dated June 25, 1923, and recorded in Volume 127, Pages 266-276 of Cuyahoga County Records of Leases. The case of Ulmer vs. Fulton, Superintendent of Banks, 129 O. S. 323, has raised the question as to whether or not I have an interest in said premises under the rule of law set forth in that decision, and there is also the question as to what, if any, my interest is under the terms of said Agreement and Declaration of Trust dated August 15, 1924. Neither my interest in said Citizens Building property, if any, nor the rights of the holders of certificates of equitable ownership issued under said Agreement and Declaration of Trust dated August 15, 1924, have as yet been determined. Until such times as such rights and interests are determined, it is mutually to our advantage that the value of said premises be maintained and that as much income as possible shall be derived therefrom.

"Accordingly, I hereby agree that until such rights and interests are determined, The National City Bank of Cleveland in its capacity as Successor-Trustee under said Agreement and Declaration of Trust dated August 15, 1924, may take such steps and perform such acts as it, in its discretion, may deem advisable to preserve or enhance the value of said Citizens Building property or to obtain income

therefrom, including, if such steps seem advisable, the termination of said lease of June 25, 1923, hereinabove referred to, and the taking of possession of said property, and including the making, ratification or consent to leases or modifications of leases of said premises or portions thereof for a term of three years or less, and such leases or modifications of leases for a term of more than three years, the terms of which I shall hereafter approve in writing, and including such steps and acts incidental to the management of said property, it being understood between us that the taking of such steps and the doing of such acts shall be without prejudice to the rights of the undersigned or of any holder of a land trust certificate of equitable ownership issued under said Agreement and Declaration of Trust dated August 15, 1924, or of The National City Bank of Cleveland in its capacity as such Successor Trustee or otherwise.

"It is further understood that in the event it is finally determined this parcel of real estate is an asset of The Union Trust Company, I will honor all leases by you as Successor Trustee covering a term of three years or less and those covering a term of more than three years, which I shall hereafter in writing approve.

Very truly yours,
S. H. Squire,
Superintendent of Banks of the State of Ohio, in charge of the Liquidation of The Union Trust Company.

By G. H. Robertson,
Special Deputy Supt. of Banks."
(QTR 31-32, DJR 40-41)

The validity or invalidity of this trust and the ownership of the assets of the trust have never been determined. As the Common Pleas Court stated in its opinion in the declaratory judgment action:

"It is unquestionably true that the validity of the trust under consideration in this case has never

> been passed upon on its merits by any court." (DJR 71)

In the quiet title suit brought by the successor trustee, the trustee represented to the court that the validity of the trust was not involved, that it did not seek a determination of validity and that the action was brought only to determine a possible right to a part of the income of the property that The Union Trust Company might have under the terms of the declaration of trust (QTR 72). The Court of Appeals stated in its opinion that it was not ruling upon the issue of validity:

> "With respect to the quiet title action, the Declaration of Trust of August 15, 1924, gave the Union Trust Company some rights in respect to a part of the income of the property and the quiet title action was brought against the Superintendent of Banks of Ohio, Union Properties, Inc., and the Union Trust Company to quiet any possible claims. Nothing in the petition to quiet title can be found requiring any adjudication of the validity of the trust." (QTR 77)

The superintendent of banks is a public official in whom is reposed the duty to enforce the banking laws of the state of Ohio and the public policy of the state. His duty, in cases such as these, was well stated by the Court of Appeals in its opinion in **Arend v. Fulton**, 53 O. App., 503, 5 N. E. (2d), 792 (1936). In this case, the bank which created the trust being in liquidation, a certificate holder filed suit to have a successor trustee appointed. The superintendent of banks opposed the petition, denying the validity of the trust and asserting that the assets thereof should remain in the bank. The beneficiaries sought to distinguish the case from the **Ulmer** case on the ground that in the **Ulmer** case the superintendent of banks upheld the validity of the trust and

beneficiaries attacked it, whereas in the **Arend** case beneficiaries upheld the validity of the trust and the superintendent attacked it. Commenting upon this argument, the court said:

> "* * * And if such a trust be invalid as against public policy, it is difficult to conceive why its validity or invalidity should be determined and controlled by the desire of a certificate holder, or by the changing position of the Superintendent of Banks, who represents not himself as an individual, nor the state as such, but acts as a liquidating agent to possess and preserve the property and assets of the bank for the benefit of its depositors. * * *"

In the quiet title suit, therefore, the attorney general, believing that it was the duty of the superintendent of banks not to avoid a determination of the issue of validity, squarely raised that issue. While all of the other parties demurred to the cross-petition of the Alburn group of beneficiaries, the petitioners in this court, the superintendent of banks filed an answer, in substance a general denial, and, in addition, alleged in this answer:

> "These defendants being public officials take no position with reference to the validity or invalidity of the trust in question, considering that to be the duty of the Court after full consideration of the facts and the law * * *" (QTR 41)

The superintendent of banks did not pray for a dismissal of the cross-petition but asked the court to protect his interests in any order made upon the issues joined by his answer (QTR 41). The court failed to consider the validity of the trust. There was no consideration of the facts whatsoever, no evidence having been introduced. Moreover, the court completely ignored the superintendent of banks' answer to the cross-petition and

proceeded to final judgment without ruling upon the issues made up by the cross-petition and general denial. Nowhere in the decree quieting title is there any reference to the disposition of this issue (QTR 6-11).

While the special counsel acting for the then attorney general thus filed an answer to the petitioners' cross-petition in the quiet title suit, he filed a demurrer to the petitioners' petition in the declaratory judgment action (DJR 27), apparently believing that the quiet title suit was a better vehicle for the determination of the issue than was the declaratory judgment suit.

In the quiet title decree, the court has enjoined the superintendent of banks, as well as other parties, from setting up any claim to the property adverse to the title and possession of the successor trustee (QTR 11). This injunction will prevent a determination of the issue of validity by any of these parties, although it is necessary that this issue be decided before The Union Trust Company is completely liquidated, for, if the trust is declared invalid, the property is an asset of the bank.

Furthermore, if this trust is invalid, the transaction was in contravention of the public policy of the state of Ohio as laid down by the Supreme Court of Ohio in the **Ulmer** and **Haggerty** cases, and it would be the duty of the attorney general to take cognizance of the matter and to take such action as may be required for enforcing the public policy of the state.

In the long course of this litigation there have been various special counsel assisting different attorneys general of the state of Ohio and it appears, from our review of the matter, that, at times, varying positions have been taken by them. The simple result, however, of the conflict between the main contestants is that there has

been no judicial determination of the validity or invalidity of the trust and that such a determination is necessary to clear the title to the property and to terminate the liquidation of The Union Trust Company without leaving undetermined the disposition of a possible asset of substantial value. Since the injunction issued by the Common Pleas Court and affirmed by the higher courts prevents any other solution of this matter, we believe that the only available remedy now lies in the hands of this court.

We think that valid reasons have been presented to this court for the exercise of its jurisdiction and hope that it sees fit to consider the matter upon its merits.

Respectfully submitted,

HERBERT S. DUFFY,
Attorney General of Ohio,
W. H. ANNAT,
Assistant Attorney General of Ohio,
State House, Columbus 15, Ohio,
Attorneys for the Superintendent of Banks of the State of Ohio.

Of Counsel:
WILLIAM C. BRYANT,
DONALD B. LEACH.